

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LEA B. SMITH)	
Claimant)	
V.)	
)	
ATRIUMS MANAGEMENT CO., INC.)	Docket No. 1,063,210
Respondent)	
AND)	
)	
ARCH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant requests review of Administrative Law Judge Kenneth J. Hursh's March 13, 2013 preliminary hearing Order. Leah B. Burkhead of Mission, Kansas, appeared for claimant. Rex Henoch of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

Claimant's application for hearing alleges injury to her neck and left upper extremity from July 2, 2012 through October 31, 2012. Judge Hursh found claimant's injury by repetitive trauma arose out of and in the course of her employment. However, Judge Hursh denied benefits after finding claimant's date of repetitive trauma was September 7, 2012, and that notice was untimely when provided on October 31, 2012.

The record on appeal is the same as that considered by the administrative law judge and consists of the transcript of the March 13, 2013 preliminary hearing and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Claimant argues her date of accident for repetitive trauma is October 22, 2012, which makes notice on October 31, 2012 timely. Claimant also asserts respondent had "actual knowledge" of her injury, which waives the notice requirement under K.S.A. 2012 Supp. 44-520. Claimant requests that the Board reverse Judge Hursh's Order and remand this matter with the direction that he order an authorized treating physician and any other relief deemed proper.

Respondent requests the Board affirm Judge Hursh's Order.

The issues before the Board are:

1. Did claimant provide timely notice pursuant to K.S.A. 2012 Supp. 44-520?
2. What is claimant's date of injury by repetitive trauma?¹

FINDINGS OF FACT

Respondent is a retirement home consisting of both one-bedroom and two-bedroom apartments. Claimant began working full-time for respondent in May of 2010 as a housekeeper, responsible for cleaning six apartments per day. Her job duties included dusting, vacuuming, cleaning the kitchen, cleaning the bathroom and scrubbing the floors. These duties involved repetitive lifting, pushing, pulling, bending, twisting and kneeling.

In mid-July 2012, claimant began experiencing chest, left shoulder, left arm and upper back pain. On July 30, 2012, her family physician, Shaun B. Holden, M.D., recommended she go to the emergency room, as he was concerned she may be having a heart attack. She notified her interim supervisor, Joyce Reno, that she was having pains in her chest, arm and neck and her doctor had recommended she be seen at the emergency room. Ms. Reno asked claimant if her condition was work related. Claimant replied that she did not know or was not sure. Claimant left work and went to the Research Belton Hospital emergency room where a heart attack was ruled out. She was taken off work through July 31, 2012. Claimant called in sick on August 1, 2 and 3, 2012.

On August 6, 2012, claimant returned to work, but was only able to work a couple of hours.² As her symptoms persisted, claimant sought treatment with Dr. Holden's office. Claimant did not return to work.

Claimant had a follow-up appointment with Dr. Holden on September 7, 2012. She complained of pain in her left upper extremity, left shoulder and chest. Dr. Holden indicated claimant had not been able to work for the past six weeks and pain was exacerbated by movement of the arm and lifting. Dr. Holden indicated there was no trauma noted. His report stated, "[Claimant] does clean apartments however and feels that it is most likely related to her work."³ Dr. Holden diagnosed claimant with left cervical radiculitis. He ordered an MRI of the cervical spine, an EMG of the left upper extremity, and recommended she be seen by a pain clinic after completion of the EMG. She was prescribed various medications.

¹ Date of injury by repetitive trauma is not an appealable issue, but review of such issue is necessary to determine if notice was timely.

² P.H. Trans., Resp. Ex. B.

³ *Id.*, Resp. Ex. D.

Dr. Holden referred claimant to Dr. Edwards for injections. She testified that she received injections on September 19, October 3, and October 24, 2012.

Claimant's final appointment with Dr. Holden was on October 22, 2012, when she requested a release to return to work after her last injection.

On October 31, 2012, claimant returned to work and worked one-half day before leaving due to pain. Claimant has not subsequently worked.

Claimant was seen by Michael J. Poppa, D.O., at the request of her attorney, on December 18, 2012. She complained of persistent pain and symptoms involving her neck and left upper extremity/shoulder which impacted her activities of daily living and her work duties. Dr. Poppa diagnosed her with a chronic musculoligamentous myofascial condition and opined her employment with respondent was the prevailing factor. Dr. Poppa indicated she had not reached MMI and should be seen by a physiatrist for definitive treatment. Claimant was to remain off work until then.

At the time of the March 13, 2013 preliminary hearing, claimant was still experiencing pain in her neck, left shoulder and left arm. Claimant indicated that between July 30 and October 31, 2012, she spoke with Ms. Reno on several occasions about her condition and during these conversations, Ms. Reno would make a comment about it possibly being work related, to which she would respond, "I don't know."⁴

Claimant testified that on October 31, 2012, she notified her supervisor, Sue Lancaster, that she was claiming a work-related injury. She indicated Ms. Lancaster told her she would need to report it to the manager, Dolly LaTorre, which she did on November 1, 2012. When questioned regarding this, claimant testified:

Q. Now, as I understand it, you admit the first person that you actually told – the first person with Atriums that you actually told that you were claiming this was work related or that this was some type of accident on the job, whether it was repetitive trauma or whatever, that would have been Sue Lancaster.

A. Yes.

Q. And that first time I think, according to you, was October 31st, 2012?

A. Yes.⁵

⁴ *Id.* at 10, 14, 15, 31-32, 35.

⁵ *Id.* at 29; see also p. 32.

Claimant testified the first time she was told her condition may be work related was when she saw Dr. Holden on October 22, 2012. When initially questioned at the preliminary hearing regarding her discussion with Dr. Holden, claimant testified:

Q. And my question would be, why October 31st, 2012, did you go to Sue [Lancaster] and say, I want to turn this in as work comp?

A. When I went to my doctor on October 22nd, I had to go back there specifically to get a release to go back to work because I couldn't – Dolly said I could not return until I had a doctor's release; and he wrote my release and he told me that it was most likely work-related and that I was going to have to find another job.

Q. And just so I'm clear, was this the first time that a doctor had told you that your condition was work related?

A. Yes.

Q. And in looking through the records, prior to October 22nd, 2012, there's some references that you thought it might be work related or you told the doctors what you did at work.

A. Right.

Q. And you admit that you did visit with the doctors about some concerns you had with this being a work-related condition.

A. Yes.

Q. But just so I'm clear, prior to October 22nd, 2012, none of those doctors had ever said this is potentially work related or this is work related.

A. No.⁶

On cross-examination, claimant admitted that she testified at a January 22, 2013 deposition that Dr. Holden probably told her her condition was work related in September 2012 and that Dr. Edwards told her the same thing when he first administered a cortisone injection, which she believed occurred on October 3, 2012. Thereafter, claimant's attorney elicited the following testimony:

Q. And it was – the question was when a doctor told you that this condition was work related or potentially work related, and you said probably September for Dr. Holden. And your testimony today is that that was October 22nd, 2012; is that correct?

⁶ *Id.* at 15-16; see also pp. 18, 25-27, 33-35.

- A. Yes.
- Q. Okay. Why would you say probably September when your deposition was taken if, in fact, it was October 22nd?
- A. I wasn't – that's why I said probably. I didn't know for sure on – about dates about that.
- Q. Okay. What's changed since the deposition? Why can you tell us today it was October 22nd?
- A. Because that is the day that I had to get my release form to go back to work, and that's the day that he told me that he thought it was work related and that I was going to have to find another job.
- Q. So after the deposition, you had an opportunity to review the records of Dr. Holden?
- A. Yes.
- Q. And you could see then that October 22nd is when you went in to get the release.
- A. Yes.
- Q. So that's why you know that was the date.
- A. Correct.
- Q. Okay. You weren't trying to mislead anybody –
- A. No, I wouldn't –
- Q. Let me finish, please. You weren't trying to mislead anybody when you testified probably September.
- A. No.
- Q. You've done your best to be honest and forthright during this whole process. Is that a fair statement?
- A. Yes.⁷

⁷ *Id.* at 33-35.

Ms. LaTorre testified at the preliminary hearing that claimant told her on August 13 or 14 that she was going to be gone for a while, so she asked claimant to complete FLMA paperwork. Ms. LaTorre's impression was that claimant needed the time off because of a suspected heart condition. It was not until she received the FMLA certification back from the doctor that she found out they had ruled out pulmonary and coronary and determined claimant's condition involved deep connective tissue. She indicated claimant first told her she was claiming a work-related injury on November 1, 2012.

Ms. LaTorre testified that employees are told at orientation that as soon as they feel they have a work-related injury, they are to report it to their supervisor.

Ms. Reno testified that when claimant told her she needed to go to the hospital on July 30, 2012, she asked claimant if she thought her problem was work related and claimant told her she was not sure and did not know where she had hurt herself. They would periodically have conversations in which they would discuss how claimant was doing and whether her condition was work related. Claimant never told Ms. Reno that her condition was work related "because the doctor hadn't made a diagnosis yet."⁸

When questioned regarding whether she believed claimant sustained a work related injury, Ms. Reno testified:

Q. In your mind during that period of time, let's just say July 30th, 2012, through October 31st, 2012, in your own mind, did you have questions about whether or not her condition could be work related? Were you thinking it could be.

A. It could be.

Q. You were thinking it could be.

A. I really wasn't thinking much of anything. I was trying to get my work done, but there's a chance, you know.⁹

Judge Hursh ruled claimant injured her cervical spine and/or left upper extremity by repetitive trauma arising out of and in the course of employment. He noted that claimant had to have known she was off work due to a work-related injury by September 7, 2012, which he noted was when she first sought treatment for her injury. Judge Hursh found claimant's date of injury by repetitive trauma was September 7, 2012, and she failed to report the injury within 20 days thereafter. For lack of timely notice, Judge Hursh denied claimant's request for workers compensation benefits.

⁸ *Id.* at 67.

⁹ *Id.* at 73.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states:

The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-501b(b) states an employer is liable to pay compensation where the employee incurs personal injury by repetitive trauma arising out of and in the course of employment. "In the course of" employment relates to the time, place, and circumstances under which the accident occurred, and means the injury happened while the worker was at work in the employer's service. "Out of" the employment points to the cause of the accident and requires a causal connection between the injury and the employment. An injury arises "out of" employment when if it arises out of the nature, conditions, obligations and incidents of the employment.¹⁰

K.S.A. 2012 Supp. 44-508 states in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

- (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
- (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
- (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
- (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

¹⁰ See *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P. 2d 837 (1984).

. . .

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2012 Supp. 44-520 states in part:

(a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; . . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

"When a workers compensation statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, no need exists to resort to statutory construction."¹¹

¹¹ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 607-08, 214 P.3d 676 (2009).

ANALYSIS

This Board Member agrees with Judge Hursh's ruling that claimant provided notice for injury by repetitive trauma on October 31, 2012.

Whether notice is timely depends on the date of injury by repetitive trauma, which is a legal fiction.¹² Claimant needed to provide notice within 20 days from seeking medical treatment for her injury by repetitive trauma or 30 days from the date of injury by repetitive trauma, whichever came first. The Appeals Board has interpreted the 20 days notice requirement as 20 days from the date claimant sought medical treatment for the repetitive trauma injury after the date of injury by repetitive trauma has been established under K.S.A. 2012 Supp. 44-508(e).¹³

As an initial matter, respondent did not have actual knowledge that claimant suffered injury by repetitive trauma. Claimant's discussions with Ms. Reno that she did not know whether she had a work injury do not show that respondent was aware of the time, date, place, person injured and particulars of such injury, including whether claimant had been injured at work at all. The *Weber*¹⁴ case, cited by claimant, involves a situation where respondent had actual knowledge of claimant's injury when claimant specifically told respondent that a doctor instructed her to avoid a particular work activity that caused pain.

Respondent argues that claimant sought medical treatment for her condition on July 30, August 22 and/or September 7, 2012, and had 20 days thereafter to provide notice of her injury by repetitive trauma. None of the triggering events which create a date of injury by repetitive trauma had occurred by July 30, August 22 or September 7, 2012. It would appear difficult for claimant to give respondent notice of an event that had yet to occur.

Judge Hursh found a date of injury by repetitive trauma as occurring on September 7, 2012 – when claimant personally knew that she had a work-related injury. Claimant told Dr. Holden her complaints were due to her job duties. While it makes common sense to find a date of injury by repetitive trauma where the worker feels that job duties cause symptoms or a physical condition, that is not what the law spells out. The new law does not affix a date of injury by repetitive trauma when claimant feels her injury is due to work activities or when claimant tells a physician that she feels her symptoms were related to her work. Claimant's state of mind does not trigger a date of injury by repetitive trauma. Rather, the date of injury by repetitive trauma is based on the earliest of several triggering events listed in K.S.A. 2012 Supp. 44-508(e).

¹² *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

¹³ See *Shields v. Mid Continental Restoration*, No. 1,059,870, 2012 WL 4763702 (Kan. WCAB Sep. 19, 2012).

¹⁴ *Weber v. Walgreen's*, No. 1,021,539, 2005 WL 1983421 (Kan. WCAB July 1, 2005).

The first two considerations for an injury date are based on when a claimant is taken off work or provided modified or restricted duties by a physician due to diagnosed repetitive trauma. There is nothing in the record that claimant was ever given a diagnosis of repetitive trauma, at least until after she was seen by Dr. Poppa on December 18, 2012. The law does not allow a date of injury by repetitive trauma after the last day worked.

Another possible injury date is when a physician first told claimant her condition was work related. Claimant testified – at the preliminary hearing – that no physician advised her that her condition was work related until Dr. Holden did so on October 22, 2012. Claimant previously testified – at her January 22, 2013 deposition – that Dr. Holden probably relayed such information to her in September 2012 and that Dr. Edwards told her the same thing when he first administered a cortisone injection, which she believed occurred on October 3, 2012.¹⁵ In any event, claimant testified at the preliminary hearing that her deposition testimony was uncertain. She testified that she reviewed her medical records after her deposition and was assured that she was never told by a doctor that her condition was work related until being so advised by Dr. Holden on October 22, 2012.

While it may seem appropriate to affix a date of injury by repetitive trauma based on when a claimant is aware that work activities have caused injury, K.S.A. 2012 Supp. 44-508, when read literally, contains no such directive. A claimant's opinion as to cause of injury does not equate with a doctor's diagnosis that a condition is work related.

Ms. LaTorre, respondent's manager, testified that she had no reason to doubt claimant's credibility and claimant "absolutely" never seemed anything but honest.¹⁶ Judge Hursh made no mention as to claimant's credibility. Based on the current record, this Board Member accepts as true claimant's preliminary hearing testimony over her deposition testimony. Analyzing K.S.A. 2012 Supp. 44-508(e), the earliest date of injury by repetitive trauma was when claimant was advised by Dr. Holden that her condition was work related on October 22, 2012. Notice provided on October 31, 2012 was timely.

CONCLUSIONS

The undersigned Board Member reverses Judge Hursh's preliminary hearing Order. This matter is remanded for Judge Hursh's determination of issues raised by claimant at the preliminary hearing, including medical treatment and temporary total disability benefits.

¹⁵ Claimant previously testified that her first injection was on September 19, 2012. No records from Dr. Edwards were introduced into evidence.

¹⁶ P.H. Trans. at 58.

The above preliminary hearing findings and conclusions are neither final nor binding as may be modified upon a full hearing.¹⁷ This review of a preliminary hearing Order was determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to review by the entire Board when the appeal is from a final order.¹⁸

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated March 13, 2013, is reversed and remanded.

IT IS SO ORDERED.

Dated this _____ day of May, 2013.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Leah B. Burkhead
lwheeler@markandburkhead.com

Rex Henoeh
rex.henoeh@sbcglobal.net

Honorable Kenneth J. Hursh

¹⁷ K.S.A. 2012 Supp. 44-534a.

¹⁸ K.S.A. 2012 Supp. 44-555c(k).